BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: GENERAL TRUSS CO, INC. 6947 Power Inn Road Sacramento, CA 95828-2402 Employer	Docket Nos. 06-R2D1-0782 through 0784 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

On September 19, 2005, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment maintained in California by General Truss Co. (Employer).

On March 1, 2006 the Division issued three citations to Employer alleging five violations of occupational safety and health standards codified in California Code of Regulations, Title 8, two of which were classified as serious.[1]

Employer timely filed an appeal of the citations. Administrative proceedings were held, which included an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. At the hearing, the parties resolved all but three issues. The ALJ had to determine the appropriate penalty for a violation of section 342(a) [failure to report serious injury] (Citation 1, Item 1), and the existence and appropriate penalty of an alleged serious, accident-related violation of section 4300(f) [failure to ensure push stick of suitable design was provided and used by table saw operator] (Citation 2, Item 1).

On February 14, 2008, the ALJ issued a Decision imposing a $5000.00 penalty for the violation of section 342(a). The decision also upheld the violation of 4300(f) and the classification of serious, accident-related, but found

[1] References are to California Code of Regulations, Title 8 unless specified otherwise.

the Division's reasons for increasing the base penalty and applying other adjustment factors as allowed in section 336 were not supported by the evidence, and reduced the penalty accordingly.

On March 13, 2008, Employer filed a Petition for Reconsideration that asserted two errors in the ALJ's evidence rulings, and challenged the sufficiency of the evidence for the penalties assessed for both remaining violations.[2] The evidence rulings of concern were the exclusion of statements made by Employer's manager to its owner several days after the accident, and the inclusion of a portion of Employer's accident investigation report stating Employer intended to provide training as a result of the accident.

In its Answer to Employer's petition the Division argues that the evidentiary rulings by the ALJ were correct, and that the evidence supports the imposition of the penalty for each violation.

After thorough review of the record and consideration of Employer's arguments, we find the ALJ's Decision is supported by the record and affirm it.

EVIDENCE

Employer manufactures trusses. It uses large and small saws to size lumber for this purpose. Its employee, Enrique Prado, worked for Employer approximately seven years. For some of that time he had been a supervisor, had trained employees, and had served as an interpreter (English to Spanish) during safety meetings.

On September 7, 2005, he was working under the supervision of Juan Gonzales, who instructed him to resize some pieces of wood. To that end, Gonzales brought a table saw to where Mr. Prado was working on another assembly task. Gonzales also brought an 11 inch piece of 4 x 6 wood to Mr. Prado, and indicated the piece was to be resized to 4 x 4, by using the table saw. This action requires cutting the wood down its length. Mr. Prado testified that the saw blade was too small to accomplish the task, and relayed his concern to Mr. Gonzales. No remedy for the perceived problem was provided by Mr. Gonzales. Mr. Prado proceeded to follow Mr. Gonzales's instructions to resize the piece of 4 x 6. As he fed the wood in to the unguarded table saw, the material pushed up and forced his hand toward the blade, cutting his thumb. Mr. Prado testified Mr. Gonzales was standing next to him, approximately 4

[2] Employer also requested and was granted leave to file a supplement brief in support of its petition for reconsideration. In that supplemental brief, Employer only makes further argument regarding the sufficiency of the evidence of the penalties, not the rulings on the admissibility of the two items of evidence. Employer did not raise any issue regarding the finding that a violation of 4300(f) was established. Pursuant to Labor Code section 6618, Employer has waived any claim of error regarding the existence of the violation.

feet away from the table saw, with his back to Mr. Prado, when Mr. Prado picked up the first piece of wood and ran it through the unguarded saw. Mr. Prado did not use a push stick for this maneuver, and he was not instructed by Mr. Gonzales to use a push stick, or to wait until Mr. Gonzales could locate or fashion a suitable push stick.[3]

Although the owner, two other employees, and the safety director testified about the work of Employer, none stated employer had a policy of requiring push sticks, or that any method of fashioning push sticks was ever in place other than an "ad hoc" availability of scrap wood that could be used by an employee as a push stick. One employee, Mr. Herrera, testified he had used push blocks in the past when operating the saw that caused the injury. Mr. Prado testified he had not used push sticks in the past when operating Employer's saws, and that he had only used the table saw a few times during his seven years of employment with Employer.

Employer's owner, Jurgens, and its former safety officer, Wachenfeld, testified that Employer generally required its employees to be safe. Mr. Wachenfeld testified that if he saw a safety problem he would report it to the owner or the plant supervisor, Mike Hawkins, for action. Regarding push stick use or non-use, Wachenfeld testified a push stick could be a piece of scrap, but he could not recall a specific instance of correcting an unsafe work practice associated with the lack of use of push sticks. He further stated he would stop an unsafe work practice regarding non-use of a push stick. He stated push sticks were not used a lot in Employer's truss manufacturing operation. His job did not require him to write up an employee for not using a push stick or push block.

After the injury, Herrera saw Mr. Prado bleeding. Mr. Prado was taken to the hospital by plant manager Mr. Hawkins. The owner, Mr. Jurgens, testified regarding statements made to him by Mr. Hawkins on the Monday following the accident, which was about four days after the accident. Jurgens stated Mr. Hawkins told him that he did not know the extent of the injuries to Mr. Prado's hand because it was wrapped up. At that time, Jurgens states, he first learned

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[3] Mr. Gonzales also testified. He stated he instructed Mr. Prado to "wait" after he brought the table saw, but before Mr. Prado began his first cut. He states a nearby employee needed his attention. However, the other employee who testified stated he was 20 feet away from Mr. Prado when the accident occurred. In any event, the ALJ concluded Mr. Gonzales's testimony was inconsistent and vacillating, and determined not to credit the testimony. We will not generally disturb ALJ determinations of credibility on reconsideration. "[A]n ALJ's credibility determinations are due great weight because she is present to observe the witness' demeanor on the stand. (*Kimes Morris Construction Inc.*, Cal/OSHA App. 02-1273, Decision After Reconsideration (Aug. 8, 2008), citing, *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318-19.) Such determinations are only disturbed upon a showing of substantial evidence to the contrary. (*Id.*)" (*Pacific Messenger Records Storage, Inc.*, Cal/OSHA App. 08-2263, Denial of Petition for Reconsideration (Sep. 8, 2010).) This record does not meet that test.

of the accident and reported it to Employer's workers' compensation carrier, but not to the Division.

The appeal form states Employer did not know of the extent of Mr. Prado's injuries because Mr. Hawkins dropped Mr. Prado at the hospital, and Mr. Prado stated his wife would pick him up later. Mr. Prado did not return to work the next day, though he returned the next week with a bandaged hand. The appeal form states the Employer does not know at the time of filing the appeal, March 9, 2006, of the extent of the injuries suffered by Mr. Prado. No evidence indicates Employer made any calls to Mr. Prado, the hospital, the workers' compensation carrier, or made any other effort to discern the extent of the injury.

The Division requested and received a standing hearsay objection to all evidence, thus calling in to question the admissibility of Hawkins's hearsay statements. Exhibits were also submitted in to the record, including exhibit 6, entitled "Management Incident Investigation report." The report was written by Randy Wachenfeld, who testified at the hearing. It contains hearsay statements which describe the incident, including a statement that no push stick was used. The report is dated September 7, 2005, the day of the injury. It also contains statements regarding Employer's planned action after the incident, specifically, to conduct training. The Employer also requested a standing objection to hearsay, raising the issue of the admissibility of statements in the written accident report on hearsay grounds.

Additional evidence regarding the serious classification of the violation of 4300(f) was admitted. The Division witness testified as to his qualifications, work history, and experience with table saws being operated without push sticks, the details of which we include below in the discussion of the serious classification of the violation of 4300(f).

ISSUES

1. DOES THE EVIDENCE SUPPORT THE IMPOSITION OF $5000.00 PENALTY FOR THE VIOLATION OF SECTION 342(a)?

2. DOES THE EVIDENCE SUPPORT THE CLASSIFICATION OF SERIOUS FOR THE VIOLATION OF 4300(f)?

DECISION

The penalty assessed for the violation of section 342(a) is affirmed.

Although an ALJ may reduce or increase the penalty proposed against an employer for a failure to timely report the injury, the $5000.00 penalty she

assessed in this case is reasonable and is therefore affirmed. Board decisions after reconsideration recognize that the Labor Code places the responsibility and authority for imposing penalties for violations of safety orders on the Appeals Board. (Labor Code § 6602; *Bill Callaway & Greg Lay dba Williams Redi-Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006); *Trader Dan's dba Rooms N' Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009); *Melmarc Products*, Cal OSHA App.09-2878, Decision After Reconsideration (May 12, 2010).) In those decisions, the Board has outlined factors which an ALJ may use to reduce or increase a proposed penalty for a violation of section 342(a). We have stated that when, as here, an employer fails to report an injury to the Division, any allowable reductions must be small. (*Trader Dan's*, *supra*.)

Here, the ALJ considered the hearsay statement of Mr. Hawkins that he was unaware of the extent of the injury even though he drove the injured worker to the hospital and observed the wrapped and bleeding hand during that time. She concluded it was not reasonable for Hawkins to conclude the injury must be minor when Mr. Prado was left at the hospital. We also note Mr. Prado did not work the next day, and these two facts would indicate that inquiry in to whether the injury was more than just a minor cut was needed. An employer may not choose to remain ignorant about the nature of an employee's injury. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Once an employer has notice of a sufficient likelihood of the injury being serious, additional inquiry is required. (*J & W Walker Farms*, Cal/OSHA App. 09-1949, Decision After Reconsideration (Nov. 2, 2009).) Doubts regarding whether an injury is serious can and should be resolved by reporting the injury to the Division. (*Dubug # 7 Inc.*, Cal/OSHA App. 92-1329, Decision After Reconsideration (Jun. 26, 1995), citing, *Alpha Beta Company*, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979) and *Phil's Food Market, Inc.*, Cal/OSHA App. 78-806, Decision After Reconsideration (Feb. 6, 1979).)

Thus, even if the statements of Mr. Hawkins were reliable hearsay[4], or hearsay within an exception, they do not require a reduction in the penalty

[4] The ALJ evaluated the statement of Hawkins relayed through the testimony of Jurgens. She concluded evidence Code 1222 allowed only statements against interest to be admitted as an exception to the hearsay rule, and that since these statements were offered in support of Employer's position, Section 1222 did not allow admission of the statements. We agree. In its petition for reconsideration, Employer argues the statements to Jurgens by Hawkins that Hawkins did not know the extent of the injury because Prado's hand was wrapped up is admissible under the "state of mind exception." (Evidence Code sections 1250, 1251, and 1252.) Statements demonstrating an out of court declarant's state of mind may be offered to prove the declarant's state of mind at the time the utterance was made, if that is a fact that must be established. Here, the reasonable diligence of the Employer is in issue, and Hawkins' knowledge is relevant. Although Hawkins may have actually not known of the extent of Prado's injury when he made his statements to Jurgens Monday after the accident, this lack of knowledge of the extent of the injuries is not dispositive. The issue is, given what the manager knew, did he act with reasonable diligence to learn

here. Although the Division agreed its investigation was not delayed by the lack of report by the Employer, this was because it received a separate complaint report on September 7, 2005, the day of the accident. We see no reason to credit the Employer for another person's report when Employer did not undertake any inquiry in to the extent of injury suffered by its employee. Rather, the ALJ reasonably inferred from the lack of inquiry in to the extent of Mr. Prado's injury that Employer purposely failed to report the injury. We agree this is a reasonable inference to draw from Employer's actions. On balance, the ALJ properly evaluated the evidence and exercised her discretion in assessing the penalty proposed. We therefore decline to disturb the penalty she imposed.

THE EVIDENCE SUPPORTS THE SERIOUS CLASSIFICATION OF THE VIOLATION OF SECTION 4300(f) IN CITATION 2, ITEM 1.

At the time of the violation, the Labor Code defined a serious violation as one wherein, assuming an accident occurs as a result of a violation, there exists a substantial probability of serious physical harm, which has been determined to be the same as serious physical injury. (Labor Code § 6432.)[5] In order to prove that a violation is serious, the Division must provide evidence that, assuming an accident or exposure results from the violation, the result is more likely than not to be death or serious injury, as that term is defined (i.e. resulting in permanent loss or disfigurement, or hospitalization for more than 24 hours for more than observation.) (*BLF Inc*, Cal/OSHA App. 03-4428, Decision After Reconsideration (Jan. 21, 2011); *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004), citing *Findly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).)

The probable nature of the resulting injuries, assuming an accident occurs, may be established by an opinion about the likelihood of serious physical harm or death. This opinion must be based upon a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, an experience-based rationale, or generally accepted empirical evidence. (*R. Wright & Associates, Inc., dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 11, 1999).)

Here, Division inspector Stamatellos testified that he has personally investigated 12 injuries resulting from failing to use a push stick while operating an unguarded table saw.[6] All the resulting injuries were partial

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the extent of the injuries? The ALJ concluded and we agree he did not. This conclusion is supported by the evidence even if the hearsay statements were admissible.

[5] This section was substantively revised in 2010 affecting violations occurring on or after January 1, 2011. Since this violation occurred in 2005, we apply the former statute.

[6] The Decision of the ALJ also thoroughly recites Mr. Stamatellos's extensive safety related experience spanning several decades, including employment as a safety manager for the Department of Defense,

amputation of one or more fingers or thumb. The ALJ credited this experience-based rationale for classifying the violation of 4300(f) as serious. We agree this evidence establishes that, an accident resulting from a failure to use a push stick while operating an unguarded saw the resulting injury would more likely than not result in a total or partial loss of a member, here parts of hands.

Employer argues that Stamatellos failed to have an opinion on the likelihood of injury occurring, and asserts error in relying on such testimony to uphold the serious classification. In making this argument, Employer misstates the law.[7] It is not the probability of an injury *occurring* that determines the classification. Rather, we must assume the injury or accident occurs. (Labor Code § 6432(c).) We then must determine the probability of such accidents resulting in a serious injury. Stamatellos's testimony establishes the substantial probability of the serious nature of the resulting injuries. His experience-based rationale is sufficient evidence that the violation was properly classified as serious. (*Davis Brothers Framing*, Cal/OSHA App. 03-0114 Decision After Reconsideration (Jun. 10, 2010); *R. Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

There was evidence in the record of use of the table saw without a push stick that did not result in an accident. Mr. Prado stated he used the table saw on a couple of occasions in the 7 years he worked for Employer, and he did not use push sticks in doing so. However, such non-injury events are irrelevant for purposes of determining the classification. The law requires that an accident be assumed, and a determination of the severity of the resulting injuries be made, in deciding whether a citation should be classified as serious. There was no evidence that any, let alone a substantial number of, non-serious injuries have resulted from accidents caused by failing to use push sticks. Employer laments that "Using Mr. Stamatellos' own statistical numbers, the highest chance of an injury even occurring from not using a push stick is less than 5%." But, the Labor Code requires we assume an accident, and then evaluate the probability that death or serious physical harm will result. (Lab Code § 6432(c).)

Further, Employer failed to prove the affirmative defense to the serious classification. (Labor Code §6432(b).) To establish the affirmative defense, an employer may show it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (*Id.*) If an employer has in place safety rules that, if followed, would have prevented the violation, and can

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McClellan Air Force Base, and several years with the Division. While we have not included this extensive experience here, the record supports the ALJs summary of Mr. Stamatellos's qualifications.

[7] We note the Employer cites to an ALJ decision as "persuasive authority". We accord no precedential value to ALJ decisions, and note that the Appeals Board has never considered such decisions as being persuasive unless and until they are reviewed and adopted by the Board after reconsideration.

show that the employee disregarded such rule in a manner preventing Employer from discovering the violation, the affirmative defense is established. (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).)

Here, however, Employer had no rule prohibiting use of the table saw without a push stick. Its safety manager and owner both testified, and neither stated a rule requiring use of push sticks existed. The safety manager testified that if he saw a worker using a table saw without a push stick when he thought one was needed, he would instruct the employee to use one. He was not required to report such an event as a violation of any safety rule. He did not enforce such a rule with any discipline. Without a rule or policy requiring use of push sticks to operate unguarded table saws, Employer did not establish it was reasonably unaware of the violation here. (See *Sunrise Window Cleaners*, Cal/OSHA App. 00-3220, Decision After Reconsideration (Jan. 23, 2003).)

Also, an employer must show it adequately instructed employees about the hazards of the assigned work in order to establish it neither knew nor could have known of the violation. (*Bryant Rubber* Cal/OSHA App. 01-1358 Decision After Reconsideration (Aug. 21, 2003); *Bay Area Systems Solutions, Inc.*, Cal/OSHA App. 01-106 Decision After Reconsideration (Oct. 10, 2008).) The record shows another employee, Herrera, was aware of the hazard, and had used push sticks in the past. And, the safety manager for Employer testified that sometimes push sticks were not used and he corrected such events if he thought they were unsafe. Mr. Prado testified he was unaware of the need to use a push stick, and had not been informed of such hazard. Given the lack of evidence of a policy requiring the use of push sticks in accordance with 4300(f), we will not infer from this record that Employer adequately instructed Mr. Prado on the hazard of using a table saw without a push stick. Employer argues the saw's location was not in view of managers at the time of the injury, and that it had no reason to know Mr. Prado would not use a push stick. Such assertions do not address the elements of the affirmative defense, which require Employer to demonstrate it acted reasonably under the circumstances, by instructing the employee about the hazard, and supervising him adequately. Thus, we conclude the record contains substantial evidence to support the classification and penalty assessed for Citation 2, Item 1.

Last, Employer asserts error from the ALJ's admission of Employer's accident investigation report. However, Employer does not state how any piece of evidence from that report was used by the ALJ in error, and we discern none. Moreover, the Board has not relied on this evidence in reaching this Decision. For these reasons, we conclude the evidence in the record supports the imposition of the $5000.00 penalty for the violation of section 342(a), and is

sufficient to uphold the serious classification of the violation of section 4300(f), and resultant penalty of $16, 200.00.

ART R. CARTER, Chairman
CANDICE A. TRAEGER, Member
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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